

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CELIA E. STOUT)	
Claimant)	
VS.)	
)	Docket No. 210,402
STATE OF KANSAS)	
Respondent)	
AND)	
)	
STATE SELF-INSURANCE FUND)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Claimant appeals from an Award entered by Administrative Law Judge John D. Clark on September 16, 1996. The Appeals Board heard oral argument March 6, 1997.

APPEARANCES

Claimant appeared by her attorney, John M. Ostrowski of Topeka, Kansas. Respondent and its insurance carrier appeared by its attorney, Jeffery R. Brewer of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Andrew E. Busch of Wichita, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has reviewed and considered the record listed in the Award and has adopted the stipulations listed in the Award.

ISSUES

The sole issue on appeal is the nature and extent of claimant's disability. The Administrative Law Judge awarded benefits for a 57.5 percent permanent partial general body disability. Claimant contends that the evidence establishes that claimant is permanently and totally disabled.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes that the Award should be modified to one for permanent total disability.

Claimant was injured in the course of her employment with respondent while giving a resident a bath. The resident was spastic, and when he twisted the claimant twisted with him causing the injury. Claimant was treated by Dr. A. Kaul and various physicians to whom Dr. Kaul referred the claimant, including Jane K. Drazek, M.D., and Stephen Ozanne, M.D.

Testimony regarding the nature and extent of claimant's disability was given by three physicians. This includes the two previously mentioned treating physicians, Dr. Ozanne and Dr. Drazek, as well as the physician to whom respondent referred claimant for evaluation, Robert A. Rawcliffe, Jr., M.D.

Dr. Drazek, a physiatrist, saw claimant by referral from Dr. Kaul on July 10, 1992. Dr. Drazek diagnosed chronic back pain, upper and lower, on a myofascial basis. Dr. Drazek recommended physical therapy and saw claimant again on August 12, 1992. There was some improvement at that time. Dr. Drazek next saw claimant on December 5, 1995. At that time she reviewed the medical records from other treating physicians and made findings similar to those made in 1992. She rated the claimant's permanent functional impairment at 10 percent. Her report indicates that by virtue of the fact claimant had been off work at that point for two years the probability that she would return to work was approaching zero. Her report indicates that she believed the patient could tolerate lifting up to 25 pounds but no greater than 10 pounds on a frequent basis and 15 to 20 pounds on an occasional basis. She did not believe claimant could tolerate maintaining her body in any particular position for a prolonged period of time and recommended she not sit greater than half an hour without changing position. She also indicated prolonged standing no greater than 30 minutes at a time and recommended claimant avoid forward bending and stooping.

Dr. Ozanne treated claimant from May 10, 1993, through June 28, 1993. He ordered an MRI study which showed a lateral disc herniation at L5-S1. He recommended further testing, specifically a CAT scan with myelogram study. The CAT scan indicated there was not impingement on the nerve roots. As a result, Dr. Ozanne did not recommend surgery. He assigned an impairment rating based upon AMA Guides of 15

percent of the whole person. He concluded claimant would not be able to perform any sustained regular employment of any sort.

Dr. Rawcliffe examined and evaluated the claimant on July 18, 1996. From his history of the examination he concluded that claimant suffered no permanent impairment as a result of her permanent work-related injury except due to deconditioning, weight, and possibly underlying psychological factors. Based upon subjective complaints he recommends claimant be limited to work in the light category with occasional lifting up to 20 pounds, frequent up to 10 pounds, and recommended claimant avoid frequent bending, stooping, or crouching.

From the review of the record as a whole, including claimant's testimony regarding the increase of her symptoms following the injury in question, as well as the testimony of both Drs. Drazek and Ozanne, the Appeals Board concludes claimant did suffer permanent disability from the accident at work. The Appeals Board has also concluded, based upon both medical and vocational expert testimony, that claimant is permanently and totally disabled. Dr. Ozanne testified claimant could not sustain regular employment. Dr. Drazek's testimony also generally supports this conclusion.

Unlike the Administrative Law Judge, the Appeals Board has given some weight to the testimony of Michael J. Dreiling, one of the vocational experts. He testified that claimant is essentially and realistically unemployable. The Administrative Law Judge disregarded his testimony because Mr. Dreiling evaluated claimant's vocational opportunities without personally interviewing the claimant. He did, however, review medical records and claimant's work history. The Appeals Board considers his opinion to be entitled to some weight even though he did not personally visit with the claimant. James Molski, also a vocational expert, agreed, when advised of the difficulty claimant had sleeping through the night and the need to rest during the day, that claimant would not be able to return to competitive employment. Karen Crist Terril's testimony does not require any different conclusion.

Permanent total disability is defined in Wardlow v. ANR Freight Systems, 19 Kan. App. 2d 110, 872 P.2d 299 (1993) as "essentially and realistically unemployable." When that standard is applied here, the Appeals Board concludes claimant is permanently and totally disabled. She has worked in the same position for this respondent for some 22 years. She has a GED which she obtained in 1970. This gives her limited transferrable work experience and skills. Based upon these factors as well as the testimony of Dr. Drazek, Dr. Ozanne, and the vocational experts, the Appeals Board concludes that claimant is permanently totally disabled and entitled to benefits on that basis.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark dated September 16, 1996, should be, and is hereby, modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Celia E. Stout, and against the respondent, State of Kansas, and its insurance carrier, State Self-Insurance Fund, for an accidental injury which occurred March 21, 1992, and based upon an average weekly wage of \$448.57 for 167 weeks of temporary total disability compensation at the rate of \$289 per week or \$48,263, followed by 265.53 weeks at the rate of \$289 per week or \$76,737, making a total maximum award of \$125,000.

As of March 31, 1997, there is due and owing claimant 167 weeks of temporary total disability compensation at the rate of \$289 per week or \$48,263, followed by 95.29 weeks of permanent partial compensation at the rate of \$289 per week in the sum of \$27,538.81 for a total of \$75,801.81, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$49,198.19 is to be paid for 170.24 weeks at the rate of \$289 per week, until the maximum benefit of \$125,000 has been paid.

The Appeals Board also adopts and approves the orders by the Administrative Law Judge relating to fees and expenses.

IT IS SO ORDERED.

Dated this ____ day of March 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John M. Ostrowski, Topeka, KS
Jeffery R. Brewer, Wichita, KS
Andrew E. Busch, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director